

LEGAL OFFICE
Department of Consumer Affairs
1625 N. Market Blvd., Suite S 309
Sacramento, CA 95834
(916) 574-8220

PROCEDURES FOR
ADOPTING, AMENDING, AND REPEALING
REGULATIONS

12th Edition – January 2007

Prepared by:

ANITA L. SCURI
Senior Staff Counsel

and

IMELDA R. GALANG
Senior Legal Analyst

This document may be copied if all of the following conditions are met: the meaning of the copied text is not changed; credit is given to the Department of Consumer Affairs; and all copies are distributed free of charge.

PROCEDURES FOR ADOPTING, AMENDING AND REPEALING REGULATIONS

INDEX

	<u>Page No.</u>
I. PURPOSE	1
II. PRE-NOTICE REQUIREMENTS FOR COMPLEX / NUMEROUS PROPOSALS	2
III. INITIAL STATEMENT OF REASONS	
A. Contents	3
B. Filing	4
IV. NOTICE OF PROPOSED CHANGES	
A. Contents	5
B. Filing/Distribution	11-12
Updating Mailing List	12
C. Public Use Forms/Reports	12-13
D. Availability of Data	13
E. Length of Time Notice is Valid	14
F. Decision Not to Proceed with Rulemaking Action	14
G. Grounds for Rejection by OAL	15
V. WEBSITE POSTING OF RULEMAKING DOCUMENTS	16
VI. GOVERNOR'S REGULATORY REVIEW PROGRAM	
A. Regulatory Review	17
B. STD. 399 (Economic and Fiscal Impact)	17-18
VII. THE HEARING	
A. Oral Presentation--When Required	19
B. Matter Required to be Considered	19
C. Oaths	19
D. Continuance/Postponement	19-20
E. Changes to Proposed Action	20-22
F. Response to Recommendations/Objections	22-23

VIII. FINAL STATEMENT OF REASONS	
A. Contents	24-26
B. Filing	26
IX. REGULATION ORDERS (Other than Emergency Regulations)	
A. Format	27
B. Authority and Reference Citations	27
C. Director's Approval and Filing	27-28
D. OAL Review/Withdrawal of Regulations	28
E. Grounds for Disapproval	29-30
F. Effective Date	31
X. THE ORDER OF ADOPTION AND THE RULEMAKING FILE	
A. Contents	32-35
B. Closure of Record	35
C. Filing/Retention of Files	35
XI. EMERGENCY REGULATIONS	
A. When Permitted	36
B. Order – Format and Finding of Emergency	36-37
C. Filing	37-38
D. Effective Date	38
E. Notice and Hearing Requirements	38
F. OAL Review	38
XII. PROCEDURES FOLLOWING DISAPPROVAL	
A. Nonsubstantive Changes	39
B. Appeal to the Governor	39-40
C. Judicial Remedies	40
XIII. SECTION 100 CHANGES	41
XIV. PETITIONS TO ADOPT, AMEND OR REPEAL REGULATIONS	42-43
XV. RULEMAKING CALENDAR	44-45

XVI. APPENDIX

Exhibit	1	-	Initial Statement of Reasons	46-47
	2	-	Notice of Proposed Changes	48-53
	3	-	SAM Sections 6601-6680	54-66
	4	-	Publication Schedule	67
	5	-	Legal Office Notice Transmittal Memo	68-69
	6	-	Request for Approval of Regulations	70-71
	7	-	Fiscal Impact Statement (STD. 399)	72-75
	8	-	Notice of Availability of Language	76
	9	-	Certification re Availability of Language	77
	10	-	Format for Modified Text	78
	11	-	Final Statement of Reasons	79-81
	12	-	Section 11349.1(d)	82
	13	-	Statement of Mailing Notice	83
	14	-	Table of Contents/Statement of Completion	84
	15	-	Notice re Availability of Documents Added to Rulemaking File	85
	16	-	Certification re Availability of Documents	86
	17	-	Notice of Decision Not to Proceed with Rulemaking Action	87
	18		Rulemaking Calendar – Schedule A	88
	19	-	Rulemaking Calendar – Schedule B	89
	20	-	OAL's Instructions re Rulemaking Calendar	90-91
	21	-	1 CCR 100	92-93

PROCEDURES FOR ADOPTING, AMENDING AND REPEALING REGULATIONS

I. PURPOSE

This manual is intended to provide guidance to you in making regulatory changes. We have not attempted to include everything related to the regulatory process. We have, however, attempted to set forth the procedural requirements which must be met in order for the regulatory change process to be successful.

You should consult the attorney assigned to your agency as to whether a particular matter fits the definition of a regulation and must therefore be adopted as such. The attorney will also help you draft the text of your regulations to ensure that your proposals are clear and will achieve your objectives.

You should also work with that attorney when developing your rulemaking file so that it will be complete and the necessity for the regulation change established.

II. PRE-NOTICE REQUIREMENTS FOR COMPLEX/NUMEROUS PROPOSALS

There is a new requirement for regulatory proposals that are complex or numerous. Section 11346.45 requires that, before publishing any notice, you must have public discussions about the regulatory proposals with those who would be subject to the regulations. This mandatory pre-APA discussion is to occur when either a regulatory proposal is complex or there are numerous proposals so that they cannot easily be reviewed during the comment period.

If you do not or cannot have these pre-APA "discussions," you must state in your rulemaking record the reasons for noncompliance (with reasonable specificity).

III. INITIAL STATEMENT OF REASONS

Prior to filing a Notice of Proposed Changes with OAL, you must prepare a statement of reasons for the adoption or amendment or repeal of a regulation. If you have not already started developing your file for necessity, now is the time to start.

A. Contents

Government Code Section¹ 11346.2 requires the Initial Statement of Reasons (See Exhibit 1 for form) to include at least the following:

1. Purpose

The specific purpose of each adoption, amendment, or repeal and the rationale for your determination that it is necessary. The question to answer here is "Why are you proposing this action?"

If you address fully the purpose of and rationale for the change, you will increase the chances that the regulation will be approved by OAL.

When you draft this section, be aware that if there is any conflict between the language of the regulation and your description of the effect of the regulation, the discrepancy will create a "clarity" problem and OAL will disapprove your file.

2. Factual Basis/Rationale

The factual basis for your determination that the regulation is reasonably necessary to carry out the purpose for which it is proposed. This includes conclusions based on staff and/or board member expertise and facts or materials not contained in studies or reports. It is important that you set forth the specific reasons or need for each change and not simply provide OAL with conclusionary statements or a mere rephrasing of the regulation change. Remember that conclusions must be supported by facts or expert testimony.

3. Underlying Data

An identification of each technical, theoretical and empirical study, report or similar document, if any, on which you are relying in proposing the adoption, amendment, or repeal of a regulation. The reports themselves need not be attached to the statement of reasons but must be available to the public upon request and must be included in the rulemaking file.

¹ All section references are to the Government Code, unless otherwise specified.

4. Business Impact

Facts, documents, testimony or other evidence upon which your agency relied on to support an initial determination that the action will not have a significant adverse impact on business.

5. Requirements for Specific Technologies or Equipment.

If the proposed regulation change would mandate the use of specific technologies or equipment, a statement of the reasons why you believe such mandates or prescriptive standards are required.

A "prescriptive standard" is defined as a regulation which "specifies the sole means of compliance with a performance standard by specific actions, measurements, or other quantifiable means." § 11346.2.

6. Description of Alternatives

Section 11346.2 requires you to provide:

(a) a description of reasonable alternatives to the regulation and the reasons for rejecting those alternatives;

(b) a description of reasonable alternatives to the regulation that would lessen any adverse impact on small businesses and the reasons for rejecting these alternatives; and

(c) a statement that no alternative which you considered would be either more effective than or as effective as and less burdensome on affected private persons than your proposal.

If your regulation would either mandate the use of specific technologies or equipment or prescribe specific actions or procedures, you must consider performance standards as an alternative. A "performance standard" is defined as a regulation which "describes an objective with the criteria stated for achieving the objective." §§ 11342, 11342.6.

NOTE: You are not required to artificially construct alternative proposals, describe unreasonable alternatives, or justify why you have not described alternative proposals. You must, however, consider any alternative proposals submitted to you during the course of the hearing or public comment process.

B. Filing

The Initial Statement of Reasons must be submitted to OAL with the Notice of Proposed Changes. § 11346.2. It must also be included in the rulemaking file which accompanies the order of adoption, amendment, or repeal. § 11347.3.

IV. NOTICE OF PROPOSED CHANGES

The Notice of Proposed Changes (See Exhibit 2 for form) is the document which tells the public what sort of regulatory changes you are proposing and initiates the regulatory change process. §§ 11346.2, 11346.3, 11346.5.

A. Contents

A Notice of Proposed Changes ("Notice") must include all of the following:

1. Date, Location, Nature of Proceedings

The time, place and nature of the regulatory proceedings.

2. Authority and Reference Citations

A citation to the authority for the regulation(s) and a reference to the statute(s) or court decision(s) being implemented, interpreted, or made specific.

3. Informative Digest/Policy Statement Overview

An informative digest, similar in style to that used in legislative bills, which summarizes existing laws and any regulations directly related to the proposed action and the effect of the proposed action. This means you must state what the existing laws/regulations do and describe how the proposed action would facilitate these existing laws or would change these existing regulations.

If there is an existing comparable federal regulation or statute from which the proposed action differs substantially, the informative digest must also include a brief description of the significant differences and the full citation to such federal statute or regulation.

Where a regulation affects small business, there is also a requirement that the notice contain a concise policy statement overview regarding each proposed regulation that explains the broad objectives and, if appropriate, the specific objectives of the proposal. §§ 11343.2; 11342.580; 1 CCR 4.

This can be done rather easily by expanding your informative digest to include, in a separate paragraph, a brief explanation of the objectives of the proposal. For example, for a fee increase, the objective is to ensure the fiscal solvency of your agency.

We recommend including this overview in all notices because it is a rare regulation which will not affect "small business" as that term is defined in Government Code Section 11342.

If you decide your regulation does not affect small business, you must include in your notice a brief explanation of the reason(s) for your determination.

4. Local Mandate

A determination as to whether the regulation or any part of it imposes a mandate on local agencies or school districts and if so, whether that mandate requires state reimbursement pursuant to Section 17561 of the Government Code.

The local mandate determination must be made in accordance with Department of Finance instructions. So far as we can ascertain, those instructions are found in SAM sections 6601 through 6625 (see Exhibit 3).

5. Fiscal Impact on Public Agencies/STD 399

An estimate, prepared in accordance with instructions adopted by the Department of Finance, of costs or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 of Division 4 (commencing with Section 17500), other nondiscretionary costs or savings imposed on local agencies, and the cost or savings in federal funding to the state.

The Department of Finance instructions are currently found in SAM sections 6631 through 6680, a copy of which is attached as Exhibit 3. The Department of Finance has developed STD form 399 (Fiscal Impact Statement) to assist you in estimating the fiscal impact of a proposed regulatory action. You need to start the STD 399 on its way at the same time as you file and distribute your notice. See Section IV for further information on this process.

Three important points to remember here:

1. The fiscal impact statements in the notice must be consistent with those in your estimates on the STD 399. For example, if you checked any box in Part A of that form, then you must complete Part B in a manner consistent with what you have stated in Part A.

2. You must estimate the potential fiscal impact of the proposed regulations on your agency in addition to such impact on other state agencies which may be affected by your regulations. (Memo of August 29, 1988 to all agencies from C. J. Fippin). Keep in mind that if you estimate and state that your regulations will impose any fiscal impact, you must obtain the concurrence of the Department of Finance to the proposed regulations.

3. OAL will reject a rulemaking file if it does not include all of the following: the estimate, the data used and calculations made, and the summary report of the estimate.

6. Cost Impact on Affected Private Persons

Section 11346.3 requires you to assess, and the Notice to include, a statement of the potential for adverse economic impact on California businesses and individuals. You must assess to what extent the adoption, amendment, or repeal of a regulation will affect the creation or elimination of jobs or, businesses in California or the expansion of businesses in California.

Government Code Section 11346.5(a)(7) requires additional information if you make an initial determination that your proposed regulatory action may have a significant, statewide adverse economic impact. The Notice (Exhibit 2) has been modified to include the necessary information.

Cost impact means "the amount of reasonable range of direct costs, or a description of the type and extent of direct costs that a representative private person or business necessarily incurs in reasonable compliance with the proposed action."
§ 11342.535.

7. Housing Costs

A determination that your proposed regulatory action will or will not have a significant effect on housing costs.

8. Effect on Small Business

A determination as to whether or not the adoption or amendment affects small business. 1 CCR 4.

An adoption or amendment affects small business if a small business

- (a) Is legally required to comply with the regulation;
- (b) Is legally required to enforce the regulation;
- (c) Derives a benefit from the enforcement of the regulation; or
- (d) Incurs a detriment from the enforcement of the regulation.

If the notice of proposed adoption or amendment states that the adoption or amendment affects small business, you should indicate in the notice of proposed action a statement to that effect. That language is included in Exhibit 2.

NOTE that if you determine that the regulation does not affect small business, you shall include in the notice of proposed action a brief explanation of the reason(s) for your determination.

9. Contact Person

The name and telephone number of the agency officer to whom inquiries concerning the proposed action may be directed. Also, the name and telephone number of a back-up contact person. If the contact person cannot answer a particular inquiry, then the contact person must refer that inquiry to the appropriate person for a prompt reply.

10. Comment Period

The date by which written comments must be received in order for them to be considered prior to action on the proposed regulations.

NOTE: You may not shorten the time for submission of written comments to less than 45 days unless required to do so for reasons of administrative necessity and then only if the Notice states that you will accept written comments at the hearing itself and you in fact accept such comments. It is important to allow sufficient time to meet the 45 day requirement and OAL's filing deadlines. A time chart is attached (Exhibit 4) for your convenience.

11. Availability of Modifications

A statement as to the availability of the full text of any regulation modified pursuant to Section 11346.8.

12. Reference to Text and Initial Statement of Reasons

A statement that you have prepared a statement of the reasons for the proposed action which is available to the public upon request and that the express terms of the proposed action and all information upon which that proposal is based are available upon request.

13. Business Impact

An initial determination that your proposed adoption or amendment may or may not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states. §11346.3. Note that this requirement does apply to repeal of an entire regulation or subsection thereof. It does not apply to insignificant adverse economic impact. Although we have received no guidance as yet from OAL as to what "significant" means, we assume it means the adverse economic impact is important or substantial.

You must also refer to or identify any studies or relevant data on which you relied in making a determination that the regulation has no significant adverse economic impact. In assessing the impact of a regulatory proposal on the ability of California businesses to

compete with businesses in other states, you must consider information provided by interested parties. § 11346.3.

If you determine that your proposed regulatory action would have significant adverse economic impact on business, the following information must be included in your notice:

(A) Identification of the types of businesses that would be affected:

(B) A description of the projected reporting, recordkeeping and other compliance requirements that would result from the proposed action;

(C) A finding that the proposed action may have a significant statewide adverse economic impact on business and a statement as to whether alternatives have been considered which would reduce such impact;

(D) An invitation to the public to submit proposed alternatives.

Section 11346.3 requires that specific wording be used with reference to items (C) and (D). That language is included in Exhibit 2. If no cost impact is known to you at the time you file your notice, § 11346.3 requires a specific statement be included in the notice. See Exhibit 2.

14. Impact on Jobs/New Businesses

You must also assess whether and to what extent your proposed regulation adoption or amendment will affect the following:

(A) The creation or elimination of jobs within the State of California.

(B) The creation of new businesses or the elimination of existing businesses within the State of California.

(C) The expansion of businesses currently doing business within the State of California.

The results of this assessment must be included in your notice. §§ 11346.3 and 11346.5. Exhibit 2 includes this requirement. You will have to fill in the required information. Note that you can obtain the necessary information from existing state publications.

Also, you should be aware that these impact statements will be carefully reviewed by both State and Consumer Services Agency and OAL, so you need to make sure that your file contains information to support them and that all your estimates and impact statements are internally consistent and are consistent between the Notice and Statement of Reasons.

15. Public Hearing

If a public hearing is not scheduled (i.e. only written comments will be accepted), a statement that any interested person or such person's duly authorized representative may request, no later than 15 days prior to the close of the written comment period, a public hearing pursuant to Section 11346.8.

16. Federal Mandate

If you are proposing to adopt or amend a regulation mandated by federal law which is identical to a previously adopted or amended federal regulation: A statement to the effect that a federally mandated regulation or amendment thereto is being proposed, together with a citation to where an explanation of the provisions of the regulation can be found. § 11346.9. CONTACT YOUR ATTORNEY IF YOU HAVE A REGULATORY PROPOSAL WHICH IS IDENTICAL TO A FEDERAL REGULATION.

17. Consideration of Alternatives

A statement that you must determine that no reasonable alternative would be either more effective in carrying out the purpose for which the action is proposed or would be as effective as and less burdensome on affected private persons than your proposal. NOTE that the actual determination must be a part of both the Initial and Final Statement of Reasons.

18. Incorporation by Reference

If you intend to incorporate by reference (i.e., make another document part of the regulation by referring to it in the regulation), CONTACT YOUR ATTORNEY since certain information must be placed in the notice. 1 Cal.Code Reg. 20 sets forth standards and requirements to be met in this area. It is important to discuss with your attorney as soon as possible the requirements for and ramifications of incorporating by reference.

19. Other Matter

Any other matter which may be required by your particular agency's laws or by statutes applicable to a specific type or class of regulations.

20. Availability of Final Statement of Reasons

The notice must now include a statement explaining how to obtain a copy of the final statement of reasons once it has been prepared. § 11346.5(a)(19). See Exhibit 2.

21. Website Access

If you have a website, an explanation as to how that website can be accessed.

B. Filing/Distribution

Notice of the proposed action must be published in the California Regulatory Notice Register at least 45 days prior to the hearing and close of the public comment period. OAL is responsible for this publication once it has accepted a Notice for filing. The Initial Statement of Reasons and the specific language of the proposal must accompany the Notice. OAL asks, in the interest of efficiency, that you provide your Notice on a 3.5 diskette in Word 97 format. Please comply with this requirement if at all possible.

OAL will contact you regarding any "deficiency" in your Notice within three business days after its filing. 1 Cal.Code Reg. 120. The Notice Register is published only on Fridays, with a final filing date of ten calendar days preceding the publication date. This means that you must generally add two weeks to your calculation of the 45-day notice period. Exhibit 4 contains a current publication deadline schedule.

In addition, Section 11346.4 requires you to distribute the Notice to the following:

1. The director of the department (The director has also requested that you provide a copy directly to the Division of Legislation and Regulatory Review.);
2. Every person who has filed a request with your agency for notice of regulatory changes (You must give a person who requests notice of regulatory actions the option of being notified of all regulatory actions or just those concerning one or more particular programs. This means you will have to find a way to maintain multiple lists and use the correct list when mailing notices.) ;
3. A representative number of small businesses that are likely to be affected by the proposed action. This includes trade or professional associations.
4. When appropriate in your agency's judgment, to any person whom you believe to be interested in the proposed action and published in such form and manner as you desire. NOTE that publication in a newspaper of general circulation or a trade or industry publication is no longer mandatory unless your particular practice act requires it.

The text of the proposal and the Initial Statement of Reasons are not required to be distributed with the Notice but must be sent upon request. You may, of course, include these documents when you send the Notice to those on your mailing list.

5. OAL for publication in the California Regulatory Notice Register.
6. Your website, if you have one.

See Exhibit 5 (Legal Office transmittal memo) for a description of the complete distribution process.

You may now accept comments by facsimile and electronic mail. (§ 11340.85.) However, we recommend that you always accept comments by facsimile and electronic communication. Section 11340.85 permits you to send your notice via electronic communication to any person who has expressly indicated (in writing – which includes e-mail) a willingness to receive the notice electronically. We recommend that you find a way to indicate those on your mailing list(s) who have agreed to accept e-mail notices.

Updating Your Mailing Lists

Section 14911 requires that you correct and verify the accuracy of your mailing lists at least once each year. You may contact our office to obtain a sample "mailing list update" form.

C. Public Use Forms/Reports

With the repeal of section 11346.6, you are no longer required to make available to the public upon request copies of any public use form which your agency anticipates using as a result of any proposed adoption, amendment, or repeal of a regulation.

However, OAL is still requiring (with no apparent authority to do so) that you include such forms in your rulemaking file. Where a regulation references a form, OAL has generally been requiring agencies to place the form number and revision date into the text of the regulation.

Section 14741.1 defines public use forms as "those forms used by the state to obtain or solicit facts, opinions, or other information from the public or private citizens, partnerships, corporations, organizations, business trusts, or any nongovernmental entity or legal representative thereof."

Government Code section 11346.3(c) provides:

"(c) No administrative regulation adopted on or after January 1, 1993, that requires a report shall apply to businesses, unless the state agency adopting the regulation makes a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses."

We note that OAL has in the past interpreted this section to mean that "report" includes a form referenced in a regulation which requires submission of information to the regulatory agency. As a result, OAL looks at a file which include such a regulation to see if it contains either the required findings or an explanation as to why the forms are not reports and are therefore exempt from Section 11346.53(f). OAL will apparently presume (unless you establish otherwise) that those affected by the need to "file" the form include businesses. You need to include the necessary findings/explanation in your file to be sure that any "report" requirement will apply to all pertinent licensees, including any that are businesses.

D. Availability of Data

As indicated in Section A above, the Notice must include the name and telephone number of a contact person and a backup contact person. Those contact persons are responsible for making available to the public, upon request the express terms of the proposal (in underline or italics for additions and strikeout for deletions) and the location of public records related to the proposed action (Section 11346.5(b) and the Initial Statement of Reasons and the underlying data;

In addition, there are particular situations in which a special mailing is required.

1. Modified text. If your agency wishes to adopt modifications which are sufficiently related to the original proposal, refer to Section VII.E. for a discussion of the mailing requirements.

2. Addition of Material Not Made Available During Public Comment Period. This situation occurs where you have additional data, studies or other documents upon which you are relying in proposing the adoption or amendment of a regulation which were not identified in the Initial Statement of Reasons. It also occurs if you have any other material which you wish to add to the rulemaking record after the close of the public comment period.

If you are in this situation, you must comply with Section 11347.1. This section requires you to send a Notice to all persons who submitted oral or written testimony relative to your proposal during the public comment period or who requested that you notify them of any modifications to a proposal. See Exhibit 15 for form. If there is no one, then your file must include a statement to that effect.

The notice must be sent at least 15 calendar days prior to the adoption or amendment of the proposal. It must contain a list which specifically describes the documents and information and states where and when they will be available for public inspection.

The documents must be available at the specified time and place. Your Final Statement of Reasons must summarize and respond to any written comments concerning the documents or information.

In addition, you must include in the rulemaking record a statement confirming that you have complied with the above requirements and the date upon which the notice was mailed or sent electronically. See Exhibit 16 for form.

E. Length of Time Notice is Valid

Section 11346.4 provides that the "effective period of a notice issued pursuant to this section shall not exceed one year from the date thereof." The term "issued" is not defined in the statutes. However, a notice may logically be deemed to be issued on the

date of publication by OAL. OAL in fact uses this date to determine whether the filing is timely. OAL stamps the date of receipt and date of publication on each Notice. You must give OAL two extra copies of your Notice so that it can return stamped copies to you. It is very important that you have such a stamped copy for your files. A stamped copy is what we mean when we request that you provide us with a "conformed copy." We need one of these for our files, too.

If the proposed action is not completed and submitted to OAL within the one-year period, your agency loses the ability to act pursuant to that Notice and must re-notice the proposed change if it still wishes to make that change.

There are two little twists on the one-year period. The first arises when a file is submitted to OAL near the end of the one-year period and OAL rejects the file after the one-year period has expired. OAL will only accept a resubmittal of that file if you resubmit within 120 days from the date on which OAL mails you the detailed reasons for its rejection. If you try to resubmit that file 121 days later, OAL will not accept it and you will have to start all over again with a new notice if you wish to proceed.

The second occurs when your file has been submitted to the director for review and the one-year period expires during that review. Under this circumstance, the one-year period may be extended for a maximum of 90 days. However, if your file is not disapproved by the director, you have only five days from the date you receive the file back from the director to file it with OAL.

If your file fits into the above situation but is disapproved, contact the attorney assigned to your agency since there are different rules for disapproved files.

Note that an agency which takes a certain action based on its Notice may modify that action prior to submitting an order thereon to OAL and obtaining OAL approval. Once an order has been submitted and approved, however, the agency must start all over again with a new notice if it wishes to further change the particular regulation.

E. Decision Not to Proceed with Rulemaking Action

There is a new requirement if you decide to drop your rulemaking proposal before the one-year period expires. Section 11347 now requires that you deliver notice of that decision to OAL for publication in the Notice Register. Until such time as OAL specifies requirements for this type of document, please use Exhibit 17.

G. Grounds for Rejection by OAL

Section 11346.4 authorizes OAL to refuse to publish a Notice if the Notice does not comply with the provisions of Article 5. OAL will determine the acceptability of a Notice within three days after submission to it. 1 Cal.Code Reg. 120. A Notice may be rejected by OAL if it does not contain all required matters; if you have not followed the required procedures; or if you have not submitted to OAL all documents required to accompany the Notice.

V. WEBSITE POSTING

In addition, if you have a website, you must post at least the following information about your proposed regulatory action on your website:

- a. Notice and, where applicable, any 15-day notice
- b. Initial Statement of Reasons
- c. Proposed Language or instructions on how to obtain a copy
- d. Final Statement of Reasons
- e. If applicable, a dated notice of intent not to proceed with the proposed action.
- f. OAL's decision regarding your regulatory proposal.
- g. The date the rulemaking action was filed with the Secretary of State.
- h. The effective date of the rulemaking action.
- i. A statement that anyone has the right to request a copy of the Final Statement of Reasons.
- j. Text of any proposed emergency rulemaking action.

You must post a document listed above within a reasonable time after issuing the document. All of the documents must remain posted until at least 15 days after (1) the rulemaking action is filed with the Secretary of State, or (2) you publish a notice of a decision not to proceed with the rulemaking action. (See Gov't. Code § 11347.)

Your agency should permit and encourage use of electronic communication but cannot require it. Gov't. Code § 11340.85.

VI. GOVERNOR'S REGULATORY REVIEW PROGRAM

A. Regulatory Review

The Governor's regulatory review program requires you to notify the Department and the State and Consumer Services Agency of any proposed changes in your regulations. The purpose of this notice is to provide the Department and Agency with an opportunity to comment on your proposals if they so desire.

Notice must be given at essentially the same time as you file your proposal with OAL and must comply with Departmental Memo No. 86-11 (April 4, 1986). That memo requires you to complete STD. form 399 (fiscal impact estimates) and a Request for Approval of Regulations (formerly known as Regulatory Analysis) form (Exhibit 6) in addition to the documents required to be filed with OAL when initiating the regulatory process.

You must then submit five (5) copies each of the following to your attorney for review:

1. Notice of Changes
2. Specific Language of the proposal
3. Initial Statement of Reasons

You need to submit the **original and four copies** of the STD 399 form and the Request for Approval of Regulations form together with the above documents.

Please also attach a copy of the statute(s) that you are implementing, interpreting, or making specific. This is for the use of and has been requested by the State and Consumer Services Agency.

The Legal Office will then send the package to the DCA Budget Office and the Division of Legislative and Regulatory Review for their review. From there, the package will wind its way upward to the Director and Agency Secretary (and to Department of Finance if there is any fiscal impact) and then back to the Legal Office, where it will be returned to you.

If the Director or Agency Secretary have questions or wish to provide input regarding the proposal, they will contact the board executive officer.

B. STD. 399 (Economic and Fiscal Impact)

Under the Governor's regulatory review program, the STD. 399 form (Exhibit 7) has taken on new significance. OAL has indicated informally that it will accept a STD. 399 with

your notice that is signed only by your executive officer. However, you will need to make sure you get the necessary signatures before the rulemaking file is submitted to OAL for its review. Otherwise, OAL very likely will not approve your file but ask you to withdraw the file until such time as you can submit a fully signed STD. 399.

VII. THE HEARING

A. Oral Presentation--When Required

You are required, at a minimum, to afford any interested person the opportunity to present written statements or comments prior to taking action on a proposal. § 11346.8.

If a public hearing is scheduled, you must accept either oral or written statements regarding your proposal. As a practical matter, it is best to schedule a public hearing unless the proposal is totally noncontroversial. You may impose reasonable limitations on oral presentations. § 11346.8(a).

In addition, a public hearing at which oral presentations are accepted must be held if any person requests a public hearing in writing not later than 15 days prior to the close of the public comment period. Upon receipt of such a request, you must (to the extent practicable) provide notice of the time, date and place of the hearing to those on your mailing list for notice of regulatory changes.

B. Matter Required to be Considered

Section 11346.8 requires your agency to consider all relevant matter presented to it before taking action.

If you are proposing regulatory action which would have a significant adverse economic impact on businesses, you must consider any alternatives submitted to you during the comment period.

If you are proposing regulatory action which you have determined would significantly increase housing costs, you must consider revisions to your action that would have the effect of offsetting the increase in housing costs. Such revisions must be considered regardless of whether or not you have received any comments or suggested revisions from the public. In other words, staff must come up with suggested revisions if necessary. If no offsetting action is taken, you must explain in writing the reasons for your decision. Your explanation must be included in the rulemaking file.

C. Oaths

The agency or its duly authorized representative may administer oaths at a regulation hearing. § 11346.8.

D. Continuance/Postponement

1. Continuance in General.

A hearing may be continued or postponed to such time and at such place as the agency shall determine. § 11346.8. However, in such event you must provide notice to the public as to when the hearing will be resumed or rescheduled. If the continuance or postponement occurs at the time originally set for the hearing, information regarding such postponement or continuance must be conspicuously posted on or near the door of the place where the hearing was scheduled to be held. § 11129. If such postponement or continuation is not made at the time and place set in the notice for the original hearing, notice of the change should be sent to those on the mailing list and/or published in the California Regulatory Notice Register.

2. Continuance for New Issues

If you receive a comment at a public hearing that raises a new issue, and if a member of the public asks for additional time, you must consider granting that request if it would be practical to do so and if that would not unduly delay action on the regulation. § 11348(e).

E. Changes to Proposed Action

1. When you can make changes

Your agency may not adopt, amend or repeal a regulation unless the specific language of the proposed action has been made available to the public at least 45 days prior to the public hearing or close of the written comment period.

Your agency may take an action which differs from that proposed only if:

a. The change or modification is nonsubstantial (does not "materially alter the requirements, rights, responsibilities, conditions, or prescriptions contained in the original text." (1 Cal.Code Reg. 40) or solely grammatical in nature; or

b. The resulting change or modification is sufficiently related to the original text previously made available to the public that the public was adequately placed on notice that the change could result from the originally proposed action; and

The full text of the resulting change or modification is clearly indicated and has been made available to the public for at least 15 days prior to the date on which the agency adopts, amends, or repeals the resulting regulation. Exhibit 10 shows you how to clearly indicate the changes. If you modify your language more than once, please contact the Legal Office for the format you should follow.

If your desired change does not fall into one of these two categories, you must begin the regulatory process over again if you wish to implement that change. This notice should be treated as the beginning of the regulatory process. This means that you are starting anew and need not respond to or include comments from the prior rulemaking proceeding.

A change is considered to be sufficiently related if "a reasonable member of the directly affected public could have determined from the notice that these changes to the regulation could have resulted." 1 Cal.Code Reg. 42.

2. Options for Boards

The law makes it extremely difficult, if not impossible, for a board to adopt a substantive but related change at the public hearing. To avoid undue delay in the regulatory process, a board might choose one of the following options:

a. Options

Notice and make available alternative language for your proposal--especially if the proposal is controversial or must be acted upon as expeditiously as possible (e.g., to implement a program newly created by the legislature). You can notice options but they should clearly be identified as such.

b. Delegation to Executive Officer

When a board votes at a hearing to make a 15-day (substantially related) change, it can delegate to the executive officer the authority to adopt that change at the expiration of the 15-day comment period provided the board does not receive any adverse comments directed to the proposed revision. **If you receive adverse comments related to the revision, then the board will have to meet or hold a teleconference meeting to adopt the revised regulation.** OAL believes that decision is not a ministerial task but a policy-making task that cannot be delegated.

The minutes you submit to OAL must reflect that delegation of authority or your regulations will be rejected.

3. Notice of Availability of Changes

OAL has adopted regulations which specify the manner in which "sufficiently related" changes must be made available to the public. 1 Cal.Code Reg. 44 requires you to mail or send by electronic communication a notice, at least 15 calendar days prior to adoption of a "sufficiently related" change, to all persons:

- a. who submitted written comments during the course of the proceedings or who testified at the public hearing; or
- b. who requested notification of the availability of such changes.

In addition, you must also send every such notice to the Director, to the Division of Legislation and Regulatory Review and to the Legal Office, with a copy to Imelda Galang.

This notice must state the beginning and ending date the comment period will be received and must include a copy of the full text of each original regulation to which you are making a modification with the proposed change clearly indicated. See Exhibit 8 for form. If you decide not to change a regulation which you had proposed to change, then a 15-day notice is not required since you are not making any changes to the regulation.

NOTE that the Business and Professions Code section 313.1 requires you to send to the director a copy of every 15-day notice. So please be sure to include the director on your list whether or not the director submitted comments during the regulatory proceeding.

OAL's regulations (1 Cal.Code Reg. 46) allow you to use any method to clearly indicate changes so long as the method is uniform and it accurately illustrates all changes to the original text. You must describe in writing on the first page of the changed text the method used. Some possible methods:

- a. annotations or footnotes which specify the added or deleted language;
- b. double strikeout and double underline;
- c. for changes to newly proposed text, strikeout and either double underline or italics.

When you make the full text of a modification available to the public, you must complete a short statement to that effect which must be included in your rulemaking file if that change is adopted. § 11347.3. 1 Cal.Code Reg. 44. See Exhibit 9 for form. The statement should be accompanied by a copy of the modified text.

F. Response to Recommendations/Objections

Staff is responsible for preparing the Final Statement of Reasons (See Section VI below) in which each objection or recommendation made must be summarized along with the agency's response to it. To the extent possible and especially in areas requiring professional expertise, we recommend that you solicit board member response to recommendations or points of opposition. Such comments will help you in your preparation of the Final Statement of Reasons and may also provide additional evidence of the necessity for the regulation. Board member response may be obtained after the public testimony portion of the regulation hearing has been concluded.

Where the text of a proposed regulation has been modified, you must respond to any comments received regarding the modification. § 11346.8. If the comments are not limited to the 15-day changes, your response can simply indicate that the comment is not relevant to the proposed modifications.

VIII. FINAL STATEMENT OF REASONS

A. Contents

After the regulatory hearing has been concluded, the information contained in the Initial Statement of Reasons must be updated and supplemented in a Final Statement of Reasons. § 11346.9. See Exhibit 11 for form. YOU are responsible for preparing that document. The Legal Office will assist you whenever possible and will review your product but generally will not itself draft the Final Statement of Reasons. The Final Statement of Reasons should incorporate by reference the Initial Statement of Reasons and must include, in addition, the following:

1. Updated Information

An update of the information contained in the Initial Statement of Reasons. NOTE that if this update identifies any data, study or report upon which your agency is relying which was not identified in the Initial Statement of Reasons or which was not otherwise identified or made available for public review during the comment period, this material must be made available to the public as described in Section IV D above.

If you have changed the regulatory proposal so that the language of the regulation now conflicts with your description in the Initial Statement of Reasons of the effect of the regulation, this is the place to make them match. Otherwise, you run a significant risk that your file will be disapproved on clarity grounds.

2. Summary of Comments

A summary of the objections or recommendations made regarding the proposed regulation and a summary of each written comment received regarding any modification to the original proposal. Rulemaking files are frequently disapproved on the basis that the agency's response shows it did not give "meaningful consideration" to a comment, so be thorough in this area.

You must summarize every recommendation or objection which is specifically directed at your proposed action or at the procedures you followed in proposing or adopting the action. If several people made the same recommendation or objection, it is not necessary to repeat it for each speaker. It is sufficient if you indicate that "several people recommended/objected . . ." or if, with your summary of a specific recommendation or objection, you list the speakers who made that recommendation or objection.

You may not exclude objections or recommendations which have been accommodated by changing the proposed action.

3. Response to Comments

You must respond to each recommendation or objection made concerning the proposed action and to each written comment regarding any modification to that action either by:

(a) explaining how the proposed regulatory action was changed to accommodate an objection, recommendation or comment; or

(b) explaining why an objection, recommendation or comment was rejected.

It is not always clear when a comment is also an objection or recommendation. However, OAL appears to be construing some comments as recommendations which do not appear to the naked eye to be, in fact, recommendations. Thus, you need to review all such comments and respond to them if it is possible for them to be considered as recommendations. The safest course of action may sometimes be to respond to all comments even though you are not actually required to do so.

You may aggregate, summarize, and respond to repetitive or irrelevant comments as a group. You can dismiss a comment as "irrelevant" if the comment is not specifically directed at either the proposed regulatory action or the procedures you have followed in that rulemaking proceeding.

4. Local Mandate

The same local mandate determination that is required to be contained in the Notice of Proposed Changes, including the statement as to whether the local mandate (if one exists) is reimbursable and if not the reasons for that finding. See Section III A above for information regarding the local mandate determination. You can include form STD 399 here.

5. Business Impact/Finding of Necessity

If you have determined that your regulatory action might have a significant adverse economic impact on business, you must set forth the reasons for rejecting any proposed alternatives that would lessen the adverse economic impact.

If you have determined that your proposed regulatory action would not have a significant adverse economic impact on business, a sentence to that effect should be included in your Final Statement of Reasons.

If your regulatory action would require anything which could be construed as a "report," it will not apply to businesses unless you make a finding that it is necessary for the health, safety, or welfare of the people of the state that the regulation apply to businesses. § 11346.3. If you need to make such a finding, you may as well place it here, together with an explanatory statement if your attorney determines such a statement to be necessary. At this time, we have no idea whether OAL will simply accept the finding or whether it will

require you to set forth the reasons/basis for your finding. We also do not know how they will interpret the word "report" -- e.g. whether this includes matter required to be included in renewal applications. Nor do we know whether this requirement will be applied to amendments of existing regulations which require a report.

6. Consideration of Alternatives

You must include a determination, with supporting information, that no alternative you considered would be either more effective than or equally as effective as and less burdensome than your proposal.

A similar determination is already part of the Initial Statement of Reasons. You will be supplementing that determination with supporting information and with any alternative proposals recommended by the public or staff during the course of the regulatory process.

B. Filing

The Final Statement of Reasons must be included in the rulemaking file which accompanies the order of adoption or amendment or repeal. § 11347.3.

IX. REGULATION ORDERS (Other than Emergency Regulations)

A. Format

The text of the regulation order must have underlines for additions and strikeouts for deletions.

Orders submitted by all **boards** must contain an original signature of the executive officer on the face sheet (STD. 400). The director will sign on the face sheet (STD. 400 - Part B, #6).

Orders submitted by the **bureaus** must be signed on the last page by the chief and the face sheet must have a signature line for the director.

Orders can be certified [signed] by the head of the agency who is taking the regulatory action. That power can be delegated to another person but such a delegation must be made in writing and presumably must accompany the order. § 11343.

B. Authority and Reference Citations

Appropriate authority and reference citations must be placed beneath each regulation change made in the order. § 11346.2. "Authority" refers to the provision of law which expressly or impliedly permits or obligates an agency to adopt the regulation. "Reference" refers to those provisions of law which are being implemented, interpreted, or made specific. § 11349. It includes the California Constitution and statutes; federal statutes or regulations and court decisions or orders.
1 Cal.Code Reg. 14.

C. Director's Approval and Filing

Prior to being filed with OAL, the signed order and rulemaking file must be submitted to the Legal Office for review and transmittal to the director, who generally has 30 days within which to review and approve or disapprove your order. See Section 313.1 of the Business and Professions Code. The director must sign or approve all orders submitted by a bureau.

Once signed (or upon expiration of the 30-day period), the order and rulemaking file will be returned to you with instructions for filing with OAL. We recommend that the order be placed at the front of the rulemaking file, but not included in the file, due to concerns about the effect of the director's signature on the date of closure of the file.

If the director disapproves your regulations, such disapproval can be overridden by unanimous vote of your board. This escape clause does not, of course, apply to any of the bureaus. If the director disapproves your regulations and your board overrides the disapproval by unanimous vote, the file must be reopened to reflect what happened and a

new declaration of closure must be completed. If the director does not act within the 30-day period or if the regulation does not require the director's approval, you should note this fact either in the transmittal memo or by adding a paragraph to the Final Statement of Reasons.

If your order includes any regulation which is a building standard, you must transmit to the State Building Standards Commission a copy of that order, a copy of the notice and any other records prescribed by the State Building Standards Law (Health and Safety Code Section 18901 et seq.).

D. OAL Review/Withdrawal of Regulations

OAL has 30 working days within which to review and approve or disapprove an order. If your file does not contain all the information specified in Section 11347.3(a) and (b), OAL will notify you within three "state working days" of any deficiency it identifies. Your file will not be deemed "submitted" to OAL (and the 30 days will not start to run) until each deficiency identified by OAL has been corrected. § 11349.1(f). OAL's review in the first three days is directed to whether the file is complete, not whether your regulatory action meets the required standards. § 11349.3. See Section E below for information regarding the grounds upon which a regulation may be disapproved. If OAL has not acted to disapprove the regulation within that time, the regulation is deemed approved and OAL must transmit it to the Secretary of State for filing. OAL is required to return a disapproved regulation to you within the 30 working days, accompanied by a notice specifying the reasons for disapproval. It has seven calendar days from issuance of the notice within which to provide a written opinion detailing the reasons for disapproval. This opinion fills out the usually sketchy notice.

If you discover a major problem with your rulemaking file after it has been submitted to OAL, you may request that the file be returned to you. An oral request must be reduced to writing no later than one week from the date of the request. OAL may not request withdrawal as an alternative to disapproval. § 11349.3.

If you withdraw a proposed regulation and later wish to resubmit it to OAL, keep in mind that such resubmission must occur within one year from the date on which notice of that proposed change was published. If it is not resubmitted within that time, you must start the regulatory process all over again if you wish to implement that proposal.

We strongly recommend that you have all regulation packages hand-carried to OAL and that you get the filing date stamped on your copy of the order. It is important to have a good record particularly in case you wish to challenge subsequent action taken by OAL with respect to that specific order. If you do not wish to hand-carry your regulation package, we recommend that you send it to OAL by certified mail with a return receipt requested so that you will have some evidence of the actual date of receipt.

E. Grounds for Disapproval

A regulation can be disapproved on a wide variety of grounds. There are three primary bases for disapproval:

1. Failure to comply with all procedural requirements;
2. Submission of an incomplete rulemaking file;
3. Failure to comply with any of six specific standards.

1. Procedural Requirements

An order may be disapproved if all the procedural "i's" were not dotted or "t's" not crossed, including but not limited to the following: the required 45-day notice was not given; the notice was not distributed to those to whom distribution was required; language different from that noticed was not properly made available for 15 days or was not substantially related to that noticed.

2. Incomplete Rulemaking File

OAL will disapprove a file if it does not include all required documents or if you have not adequately or completely responded to all recommendations or objections made or to all written comments submitted regarding modifications to the proposed text.

OAL will also disapprove your order if you either did not prepare the local mandate estimate, did not include in the rulemaking file your data, calculations and summary report of the estimate, or, if your rulemaking will have fiscal impact and you do not have a Std. 399 signed by Department of Finance. If you have determined that your regulatory action will result in a reimbursable local mandate, OAL will reject your order if your rulemaking file does not include the required documentation as to availability/source of funds for such reimbursement. Exhibit 12 is a copy of Section 11349.1(d), which lists the specific types of information which must be included in your rulemaking file if you have determined that your action will result in a reimbursable local mandate.

3. Six Standards

OAL reviews and determines whether each regulation adoption, amendment, or repeal complies with the six standards set forth below. §§ 11349, 11349.1. We have received very little guidance from OAL as to how it interprets those standards. Generally, compliance with the standards appears to be determined by OAL on a case by case basis.

Authority: The provision of law which permits or obligates your agency to adopt, amend or repeal a regulation. Most agencies have a statute which contains general rulemaking authority. Sometimes specific rulemaking authority will also be provided,

particularly when the Legislature adds a new program or modifies an existing program. Authority may be express or implied. 1 Cal.Code Reg. 14.

Reference: The state or federal statute, court decision, opinion of the Attorney General, or other provision of law which your agency is implementing, interpreting or making specific through the particular regulatory action.

Consistency: In harmony with and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.

Clarity: Written or displayed so that the regulation's meaning will be easily understood by those persons directly affected by it. 1 Cal.Code Reg. 16 lists a variety of circumstances in which a regulation will be presumed to be "unclear." These circumstances include incorrect spelling, grammar or punctuation. OAL may also consider the clarity of a proposed regulation "in the context of related regulations already in existence." § 11349.1(b). We do not yet know how broadly OAL will interpret this last provision.

Nonduplication: The regulation does not serve the same purpose as another state or federal statute or regulation. A regulation should not repeat or rephrase in whole or in part a state or federal statute or regulation. 1 Cal.Code Reg. 12. You must identify any other state statute or regulation which your regulation overlaps or duplicates and justify such overlap or duplication.

Necessity: The record of the rulemaking proceeding demonstrates by substantial evidence the need for the regulation. Evidence includes facts, studies and expert opinion.

This standard is the most difficult one. You should work closely with your attorney in building a record which contains sufficient evidence of necessity.

In order to meet the necessity standard, your rulemaking file must include information which explains why each provision in your regulation proposal is necessary. If one subsection of a regulation includes three amendments, you must justify each amendment separately or risk disapproval of your file.

If you are relying on policies, conclusions, speculation or conjecture, you must include, in addition, supporting facts, studies, expert opinion or other information. 1 Cal.Code Reg. 10. OAL's regulations define an expert as "a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question." 1 Cal.Code Reg. 10. Thus, board members and staff may frequently qualify as experts whose testimony can establish the necessity for a regulation. If you are relying on such expertise, it would be wise to ensure that this fact is reflected in the rulemaking record.

E. Effective Date

Pursuant to Section 11343.4, a regulation change becomes effective on the thirtieth day after it is filed with the Secretary of State unless:

1. Otherwise specifically provided by the statute authorizing the regulation, in which event it becomes effective on the date prescribed by such statute.
2. A later date is prescribed by your agency in the order itself or in a written instrument filed with the order.
3. Your agency makes a written request to OAL demonstrating good cause for an earlier effective date. Such request should include the specific effective date desired; the reason for requesting an early effective date; whether an earlier effective date will have an impact on affected person's ability to comply with the regulations.

This last procedure gives the same result as formerly could be achieved by filing an emergency order adopted after notice and a hearing.

X. THE ORDER OF ADOPTION AND THE RULEMAKING FILE

Face Sheet (STD. 400) and Order of Adoption

The Order of Adoption is the final language adopted by your agency. The order and Std. 400 are not part of the rulemaking file. Rather, the file accompanies these documents. The STD. 400 and order need to be placed in front of the rulemaking file. It is, however, extremely important to keep a copy of the final language approved (or disapproved) by OAL with the rulemaking file.

The Order of Adoption must be in underline and strikeout format.

Rulemaking File

You must begin compiling your rulemaking file even prior to the actual preparation and filing of a Notice of Proposed Changes. This file will be the record of that proceeding and the information in the file must be available, upon request, to the public and the courts for use in reviewing the regulation. § 11347.3. The file must be maintained in one central location (§ 11348) and it must be made available for inspection and copying during regular business hours starting with the publication of the notice and for as long as the file is in your possession. § 11347.3.

A. Contents

The rulemaking file must include a copy of each of the following:

1. Index or Table of Contents/Declaration of Closure

An index must break the file down into the component parts identified in Section A. See Exhibit 14 for a suggested format. Separately list each document placed within each section. Thus, if the section entitled "Materials Relied Upon" contains five documents, each document must be individually identified on the index or table of contents.

The index or table of contents must contain a declaration under penalty of perjury by the agency person who compiled the rulemaking file specifying that the file (or the copy, if submitted) is complete, the date upon which the record closed, and that the agency has complied with Business and Professions Code section 313.1 (i.e., has submitted the file to the director for review). See Exhibit 14 for form.

2. Updated Informative Digest

The Notice of Proposed Changes contains a summary of the proposed action which is called an informative digest of the current law/rules and the effect thereon of your proposed action. You must update that informative digest to reflect any substantive changes made to the proposed text. This must be done for each regulation change contained in your order.

If the regulation text adopted does not differ substantially from that noticed, you can simply make either of the following statements on a separate sheet of paper:

"No changes have been made which would warrant a change to the informative digest contained in the Notice for sections _____."

OR

"The informative digest published on _____ by the Board/Bureau of _____ accurately summarizes the final regulatory action taken with respect to this filing."

3. A copy of any petition from any interested person proposing adoption, amendment, or repeal of the regulation and a copy of any decision which grants that petition in whole or in part.

4. All published notices of the proposed changes, including the specific language and any modification thereto.

[NOTE: Since publication is no longer a requirement, a conformed copy (stamped with filing and publication dates) should be placed in the file. If an agency nonetheless publishes the notice in a newspaper, a copy thereof should also be placed in the file.]

5. The Initial and Final Statement of Reasons.

6. All data and other factual information, any studies or reports, and all written comments submitted to the agency in connection with the adoption, amendment or repeal of a regulation.

7. All data and other factual information and any technical, theoretical, or empirical studies or reports upon which the agency is relying in adopting, amending or repealing a regulation, including any cost impact estimates required by sections 11346.3 and 11346.5 (business impact). This appears to include information contained in the Initial Statement of Reasons. If this section of your file contains any data, study or report which was not identified in the Initial Statement of Reasons, you may wish to include a brief statement that all material in this section was identified and made available for public review during the comment period. See Section III-D with respect to making available any materials added to this part of the file after closure of the public comment period.

8. A transcript, recording or minutes of any public hearing on the proposed action. You are entitled to submit the record in whichever one of the three statutorily authorized forms you select. OAL has no authority to specify which of the three forms must be submitted. The form you select, however, must fully and accurately reflect what happened at the public hearing.

A transcript or recording must consist of a "word-by-word, speaker-by-speaker record of all that is said on the record in any and all public hearings or public meetings held as part of the adoption, amendment or repeal of the regulation in question." 1 Cal.Code Reg. 90. (Emphasis added.)

Minutes must provide a summary of the proceedings and must contain sufficient information to permit effective review by OAL and effective judicial review. This means that the minutes must contain a summary of the testimony and not just a one-line statement that after discussion the board voted to adopt the regulation. The more controversial the regulation, the better your summary should be.

If you submit a transcript, recording or minutes which contain material not related to the rulemaking hearing (e.g., the tape or minutes of an entire board meeting of which the regulatory hearing was only a part), you must clearly identify which portion is related to the regulatory hearing. 1 Cal.Code Reg. 90(d). If you wish to submit a tape, we recommend you record the hearing on a tape separate from that of your board meeting.

9. A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement under Government Code Section 17561. [NOTE: This is the same determination required to be in the Notice and Final Statement of Reasons.]

10. The estimate (or disclaimer) of the following costs, together with the supporting data and calculations prepared in accordance with regulations adopted by the Department of Finance: (a) cost or savings to any state agency; (b) cost to any local agency or school district that is required to be reimbursed under Government Code Section 17561; (c) other nondiscretionary cost or savings imposed on local agencies; and (d) the cost or savings in federal funding to the state. [NOTE: This estimate is found in the Notice. However, the underlying calculations used to arrive at that estimate must be included in your rulemaking file. STD form 399 must be included with the estimate.

11. Declaration or proof of mailing to those on the regulatory changes mailing list. Use the form attached as Exhibit 13.

12. Any other information, statement, report or data which the agency is required by law to consider or prepare in conjunction with a change in its regulations.

13. A statement regarding the availability of modified text which includes the date on which any modified text was made available to the public.

14. The original text proposed and the modified text, if any, that was made available prior to its adoption.

15. Any other relevant information. For example, if your regulatory action includes incorporation by reference or would increase housing costs, consult your attorney as to what additional material must be included in the file.

[NOTE: If the above items are already included in your Initial or Final Statement of Reasons and are complete, they do not have to appear elsewhere in your rulemaking file.]

B. Closure of Record

It will be extremely important to search your files for and to local all relevant materials prior to close of the hearing or comment period. You will not be allowed to come forward after OAL has rejected your order, with "new" evidence which you dug up in response to its letter of rejection. The law prohibits you from adding any material to the rulemaking record after the close of the hearing or public comment period unless you have provided opportunity for public comment on the matter. If you review Section III D you will see that it will take some time and effort to comply with the availability requirement. The moral of this story is to do your homework first.

C. Filing/Retention of Files

A copy of the complete rulemaking file must accompany your order when you submit it to OAL. We recommend that you retain the original and supply OAL with a copy. It is always best to retain the originals for your files.

OAL no longer keeps rulemaking files. It will return your file to you. We recommend that you not send any rulemaking files to Central Archives while a regulation included in such a file still exists because of the possibility of legislative requests for review of regulations and litigation.

Government Code section 11347.3(e) now specifically prohibits you from removing, altering, destroying, or otherwise disposing of a rulemaking file for a completed regulatory change. You are permitted to send the rulemaking file to the State Archives. Section 11347.3(f). However, if you send a rulemaking file to State Archives, you shall not remove, alter, destroy, or otherwise dispose of any item required to remain as a permanent record.

The Secretary of State is given the authority (§ 12223.5) to tell you at what time you can deliver the rulemaking file to State Archives. We will update this section of the manual to reflect any such decision by the Secretary of State.

XI. EMERGENCY REGULATIONS

A. When Permitted

An agency may adopt, amend or repeal regulations on an emergency basis. An “emergency” means a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare. § 11342.545. The enactment of an urgency statute does not, by itself, constitute a need for immediate action. It is virtually impossible to find a situation where emergency regulations would be accepted. For example, fiscal problems and rapidly approaching deficits are not considered to constitute an emergency.

While an emergency order generally precedes the Notice and hearing process, it may also be adopted after that process is complete, permitting the regulatory change to take effect sooner than it otherwise would.

B. Order – Format and Finding of Emergency

An emergency order must be in the same underline/strikeout format required for a regular order. It must also contain the same required signature(s). See Section VIII A above.

An emergency order must be accompanied by a finding of emergency. § 11346.1(b). The finding of emergency must include a written statement that contains the following information:

1. Reference and authority citations.
2. An informative digest drafted in plain English in a format similar to the Legislative Counsel’s digest on legislative bills that also includes: (a) a clear and concise summary of existing laws and regulations, if any, related directly to the proposed action and of the effect of the proposed action; (b) if the proposal differs from an existing comparable federal regulation or statute, a brief description of the significant differences and the full citation of the federal regulations or statutes; and (c) a policy statement overview explaining the broad objective of the regulation and, if appropriate, the specific objectives.
3. Any other matters as are prescribed by statute applicable to your specific agency or to any specific regulation or class of regulations.
4. A determination as to whether the regulation imposes a mandate on local agencies or school districts and, if so, whether the mandate requires state reimbursement pursuant to Part 7 (commencing with Section 17500) of Division 4.

5. An estimate, prepared in accordance with instructions adopted by the Department of Finance, of the cost or savings to any state agency, the cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4, other nondiscretionary cost or savings imposed on local agencies, and the cost or savings in federal funding to the state. ("Cost or savings" means additional costs or savings, both direct and indirect, that a public agency necessarily incurs in reasonable compliance with regulations. §11346.5(a)(6))
6. A description of the specific facts demonstrating the existence of an emergency and the need for immediate action, and demonstrating, by substantial evidence, the need for the proposed regulation to effectuate the statute being implemented, interpreted, or made specific, and to address **only** the demonstrated emergency.
7. An identification of each technical, theoretical, and empirical study, report, or similar document, if any, upon which you rely.
8. If the "emergency" situation existed and was known by your agency in sufficient time to have been addressed through a regular rulemaking proceedings, then you must include facts explaining the failure to address the situation through nonemergency regulations.

Note also that you will likely not be successful if your finding of emergency is based only upon "expediency, convenience, best interest, general public need, or speculation" as that would be insufficient to demonstrate the existence of an emergency.

C. Filing

At least 5 working days before submitting an emergency order to OAL, you must send a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with your agency. That notice must include both the specific language you are proposing to adopt and the finding of emergency described in B above. The only time this notice is not required is if the emergency situation clearly poses such an immediate, serious harm that delaying action to allow public comment would be inconsistent with the public interest.

OAL has 10 calendar days within which to review an emergency regulation filed prior to notice and hearing.

OAL must disapprove an emergency regulation if it determines:

1. The situation addressed by the regulations is not an emergency.

2. The regulation does not meet one or more of the standards specified in §11349.1; or
3. The agency has failed to comply with §11346.1. §11349.6(b).

D. Effective Date

An emergency regulation is effective on the date of filing with the Secretary of State, unless a later date is specified in the order in which case the regulation will become effective on the date specified in the order. It may not remain in effect longer than 180 days unless you have completed the entire rulemaking process within that time.

E. Notice and Hearing Requirements

Once you have filed an emergency order, you must complete the entire notice and hearing process required for regular orders and file the rulemaking package with a certificate of compliance with OAL not later than 180 days from the date your order was approved.

You must formally adopt the emergency regulation and transmit it to OAL together with the rulemaking file and a certificate of compliance (certifying that you have complied with all notice and hearing requirements within the 180-day period).

If the above process is not completed, the regulation will automatically be repealed. A regulation adopted on an emergency basis cannot thereafter be readopted on an emergency basis without the express approval of OAL. OAL may, however, approve not more than 2 readoptions, for a period not exceeding 90 days each, but only if your agency has made substantial progress toward completing the rulemaking process.

F. OAL Review

OAL has 30 working days from the filing of a certificate of compliance within which to review the emergency regulation and approve or repeal it. § 11349.6. OAL cannot again review the underlying emergency but will review the order for compliance with procedural requirements and with the six standards (See Section VII E.)

XII. PROCEDURES FOLLOWING DISAPPROVAL

OAL has the authority to disapprove a regulation if it does not meet any of the six standards in Section 11349.1, if you have failed in any way to comply with provisions governing the rulemaking process, or if your rulemaking record is not complete. You should contact the attorney assigned to your agency immediately upon receipt of a notice of disapproval. The notice of disapproval will be followed within seven calendar days by a written opinion ("opinion") which details the reasons for disapproval. § 11349.3(b). Any appeal to the Governor must be filed within 10 days after receiving the written opinion, so time is of the essence.

A. Nonsubstantive Changes

If you can meet objections voiced by OAL without significantly changing the substantive provisions of the regulation, you may do so without further notice or hearing (except for that required to be given for public meetings if the disapproved regulation must be discussed at a public meeting). § 11349.4(a).

When you resubmit a file, you will have to identify the prior withdrawn or disapproved regulations by date of submission to OAL; specify the portion of the prior file that should be included in the resubmission; and submit a copy of the prior file if OAL has already returned that file to you. You should always ensure that all documents received in connection with the rulemaking process are stamped with the date on which they were received since date of receipt can be critical. NOTE that you will have to comply with the entire rulemaking process (i.e., start all over again) if you wish to make a substantive change to the regulation or if you submitted the file at the end of the one-year period and you fail to resubmit the disapproved regulation within 120 days after receiving OAL's opinion.

If you resubmit a rulemaking file pursuant to Section 11349.4(a), OAL must expedite its review of that file. In addition, OAL may not institute a completely new review of your file. It may only review the resubmitted file for compliance with the points raised in its opinion; for any issues arising as a result of a substantial change to the resubmitted regulation; or as a result of intervening statutory changes or court orders or decisions. Section 11349.4.

B. Appeal to the Governor

You may appeal OAL's disapproval or repeal of a regulation to the Governor's office. Section 11349.5 sets out the following procedures for such an appeal:

1. You must file a written request for review with the Governor's Legal Affairs Secretary within ten days after receiving OAL's opinion. This request must include:

(a) a complete statement as to why you believe the decision is incorrect and should be overruled;

(b) OAL's opinion;

(c) a copy of the entire rulemaking file.

Please note that a copy of your appeal must be delivered to OAL on the same day as your appeal is delivered to the Governor's office. This means hand-carried. We recommend that you bring an extra copy of your appeal letter and have OAL date stamp it.

OAL then has ten calendar days within which to file its written response with the Governor's office and deliver it to your agency. NOTE that the Governor's office can, for good cause, shorten your appeal time and OAL's response time.

Within 15 days after it receives OAL's response, the Governor's office must issue a written decision on the matter. This decision is published by OAL. If the Governor overrules OAL, the regulations are filed with the Secretary of State.

C. Judicial Remedies

If the Governor refuses to overturn OAL's decision, you may then resort to your judicial remedies, including petition for writ of mandate. Further, Section 11350.3 permits "any interested person" to bring an action for declaratory relief to obtain a judicial declaration as to the validity of any regulation disapproved or repealed by OAL. If the court disagrees with OAL it can order OAL to immediately file the regulation with the Secretary of State.

However, judicial remedies are really not viable for state agencies due to cost and concerns over one agency suing another.

XIII. SECTION 100 CHANGES

OAL provides a simple procedure for “changes without regulatory effect or changes also known as “Section 100 changes.” 1 CCR 100.

You may only use the simple Section 100 process if the change you are proposing does not materially change any requirement, right, responsibility, or any other regulatory element of any regulation. Section 100 changes generally would include changes to an agency’s name or address; renumbering; or deleting a regulation for which all statutory or constitutional authority has been repealed or which has been invalidated by an appropriate court.

After legal review, a board may file § 100 changes directly with OAL. A bureau, on the other hand, must submit §100 changes to the Legal Office for review, and then submission to the Director for approval.

In submitting "changes without regulatory effect" to OAL, please note that you need to submit seven (7) copies of the Face Sheet (STD. 400) and the Language and one copy of the statement justifying why the change is nonsubstantive.

See Exhibit 21 (1 CCR 100) for the procedure to follow if you wish to make a change without regulatory effect.

XIV. PETITIONS TO ADOPT, AMEND OR REPEAL REGULATIONS

Any interested person may petition your agency to adopt, amend or repeal a regulation. Section 11340.6. Such petition must state clearly and concisely:

1. The substance or nature of the action requested;
2. The reason for the request;
3. A reference to your agency's authority to take the action requested.

If you receive such a petition, you should contact the attorney assigned to your agency immediately. You must notify the petitioner in writing that you have received the petition and must, within 30 days after receipt of the petition, either:

1. Deny the petition indicating in writing the reasons for such a decision on the merits;

OR

2. Schedule the matter for public hearing in accordance with and following the usual regulation procedure.

Since most boards do not meet monthly, we have advised boards that they can comply with the law by scheduling the petition for consideration at the next possible board meeting. However, the board should notify the petitioner in writing within the 30-day period that this is what will occur.

Within 60 days after the date of denial of a petition, the petitioner may request that you reconsider your decision. You then have 30 days to again either deny the petition or set the matter for hearing, as described above.

Any decision your agency makes to grant or deny a petition either in whole or in part must be in writing. This written decision must be sent to OAL for publication in the Notice Register. Section 11340.7. Although no time frame is specified in the statute, we would recommend that you send the written decision to OAL within 30 days.

Section 11340.7 also specifies that your written decision must contain all of the following:

1. The name of your agency;
2. The name of the party submitting the petition;
3. The regulation sections which are the subject of the request;
4. Your authority to take the action requested;
5. An agency contact person; and

6. A statement about the right of any interested person to obtain a copy of the petition from your agency.

XV. RULEMAKING CALENDAR

You are required to prepare and submit to OAL by January 30 of each year, a rulemaking calendar for that year. The calendar consists of two schedules:

1. Schedule A, which describes the rulemaking necessary to implement statutes enacted during the previous year and which includes for each regulatory proposal:

a. The projected dates on which you plan to:

Publish/file the notice

Schedule a public hearing/close the public comment period;

Adopt the proposed regulation;

Submit the regulation change to OAL.

b. The organization unit within your agency responsible for the rulemaking proposal; and

c. The name and telephone number of the agency officer to whom inquiries concerning the proposed action may be directed.

NOTE: This schedule must be sent to the author of each statute enacted during the previous year for which your agency has responsibility, together with an explanation of the priority you have given the statute in the rulemaking calendar.

2. Schedule B, which describes all other rulemaking you plan to propose in order to implement, interpret or make specific statutes enacted prior to the previous year.

This schedule must contain the same information required to be contained in the other schedule. In addition, it must include a report on the status of all uncompleted rulemaking that has been described on previous calendars.

The new form of the Rulemaking Calendar separated the two schedules. Copies of the rulemaking calendars and OAL's most recent form with instructions are attached as Exhibits 18, 19, and 20. These forms can also be downloaded from OAL's website (oal.ca.gov).

You are not precluded from adopting a regulation not included in your calendar if such regulation "is required by circumstances not reasonably anticipated at the time the rulemaking calendar is prepared." Section 11017.6.

You should, however, make a concerted effort to list the subject of all changes you reasonably anticipate will be required or proposed in the upcoming year and should consult with your attorney on this.